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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1134

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY and SINCLAIR OIL CORPORATION,

Respondents.

KEN F. MANS, individually and on behalf of all persons employed by Sunray D-X Oil Company and Sun Oil Company as of the date of merger of these two companies,

Petitioners,

v.

SUNRAY D-X OIL COMPANY and SUN OIL COMPANY,

Respondents.

DEL JEANNENE JOBE individually and on behalf of employees of the previously existing Amerada Petroleum Corporation, the employees of the previously existing Hess Oil and Chemical, and the employees of Amerada Hess Corporation,

Petitioners,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 3

Questions Presented 3

Statutes Involved 5

Statement of the Cases—

Introduction 6

The Atlantic Richfield-Sinclair Merger—

1. Facts of Case 6
2. The Trial Court 8
3. The Appeal 9

The Sunray DX-Sun Oil Merger—

1. The Facts 9
2. The Trial Court 11
3. The Appeal 11

The Amerada-Hess Merger—

1. Facts of Case 11
2. The Trial Court 12
3. The Appeal 13

Reasons for Granting the Writ—

I. The decision below is inconsistent and contrary to established precedent 14

II. The lower Court erroneously applies and expands the "directness rule" 17

III. The lower Court ignored the clearly expressed congressional policy supporting the standing of employees 21

IV. The present case raises important and unsettled questions relating to the reach of the antitrust laws 23

V. Issues in this case are important to a substantial segment of American Society 28

Conclusion 32

Appendix A—Opinion, Tenth Circuit, January 8, 1973 .... A1

Appendix B—Findings and Recommendations of the Magistrate, March 20, 1972 .....A15

Appendix C—Order and Judgment of District Court, March 30, 1972 .....A19

Appendix D—Per Curiam Opinion, Tenth Circuit, January 17, 1973 .....A21

Appendix E—Order of the District Court, May 20, 1971 .....A24

Appendix F—Judgment of the District Court, June 7, 1971 .....A32

Appendix G—Per Curiam Opinion, Tenth Circuit, February 6, 1973 .....A33

Appendix H—Findings and Recommendations of Magistrate, March 20, 1972 .....A36

Appendix I—Order and Judgment of District Court, March 20, 1972 .....A39

Appendix J—Statutes Involved A41

Table of Authorities

CASES

Association of Data Processing Service Organization, Inc. v. *Camp.*, 397 U.S. 150 (1970) 30

Barlow v. *Collins*, 397 U.S. 159 (1970) 30

Bay Guardian Co. v. *The Chronicle Publishing Co.*, 340 F.Supp. 76 (N.D. Calif. 1972) 14

Billy Baxter Inc. v. *Coca-Cola Company*, 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971) 20

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 18-19

Calderone Enterprises Corp. v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972) 20

Dailey v. *Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967) 15

Flast v. *Cohen*, 392 U.S. 83 (1968) 30

Flood v. *Kuhn*, 407 U.S. 258 (1972) 3, 15, 16

Hawaii v. *Standard Oil Company of California*, 405 U.S. 251 (1972) 14, 28

Huskie v. *Griffin*, 75 N.H. 345, 74 Atl. 595 (1909) 25

Nichols v. *Spencer International Press, Inc.*, 371 F.2d 332 (7th Cir. 1967) 15, 25

Norfolk and Western Railway Company v. *Nemitz*, 92 S.Ct. 185 (1971) 24

Northern Securities Co. v. *United States*, 193 U.S. 197 (1904) 24, 30

Office of Communication of the United Church of Christ v. *F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966) 20

Perkins v. *Standard Oil Company*, 395 U.S. 642 (1969) 14

Poller v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) 18

Radovich v. *National Football League*, 352 U.S. 445 (1957) 15

Roseland v. *Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942) 14, 15

Sierra Club v. *Morton*, 405 U.S. 727 (1972) 30

Simpson v. *Union Oil Company of California*, 337 U.S. 13 (1964) 18
Standard Oil Co. v. *United States*, 221 U.S. 1 (1911) 29
United States v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945) 4, 21
United States v. *I.C.C.*, 396 U.S. 491 (1970) 24
United States v. *Parke Davis and Company*, 362 U.S. 29 (1960) 18
United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963) 19
Vandervelds v. *Put & Call Brokers & Dealers Ass'n*, 344 F.Supp. 118 (S.D. N.Y. 1972) 16

STATUTES

Clayton Act—
Section 4, 15 U.S.C. sec. 15 ..... 5, 8, 9, 10, 11, 13, 14, 17, 18, 19
Section 7, 15 U.S.C. sec. 18 ..... 5, 17, 19, 28
Section 16, 15 U.S.C. sec. 26 ..... 5, 9, 10, 11, 13
Interstate Commerce Act—
Section 5, 49 U.S.C. sec. 5 (2) (a) 5
Section 5 (2) (c), 49 U.S.C. sec. 5 (2) (c) 5
Section 5 (2) (f), 49 U.S.C. sec. 5 (2) (f) 5, 23, 24
Section 5 (b) (9), 49 U.S.C. sec. 5 (b) (9) 5, 23
10 Okla. Statutes 1971 sec. 12 ..... 5, 26
32 Okla. Statutes 1971 sec. 3 ..... 5, 26
Sherman Act, Section 1, 15 U.S.C. sec. 1 17

MISCELLANEOUS

Bakke, Citizens Without Work (1940) 25
21 Cong. Rec. 2457, 3150 (1890) 21

51 Cong. Rec. 9087, 9088, 15986, 16043, 16275, 16319 (1914) 21, 27, 32

84 Cong. Rec. 9881, 9883 (1939) 23

DeGrazia, The Political Community, A Study of Anomie (1948) 25, 26

Hearings before the Committee on Interstate Commerce, United States Senate on S. 1310 and S. 2016, 76th Cong., 1st Sess. (1939) 23

H. Rept. 1191, 81st Cong., 1st Sess. (1949) 29-30

H. Rept. 1217, Transportation Act of 1939, 76th Cong., 1st Sess. (1939) 23

H. Rept. 2832, Conference Report on Transportation Act of 1940, 76th Cong., 3rd Sess. (1940) 23

Temporary National Economic Committee, Investigation of Concentration of Economic Power, S. Doc. 35, 77th Cong., 1st Sess. (1940) 22, 23, 27, 30, 31

Tilgher, Homo Faber, Work Through The Ages (Trans. I. Fisher, 1958) 25, 26, 27

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v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered in *Reibert et al.* v. *Atlantic Richfield et al.*, (judgment entered January 8, 1973), *Mans et al.* v. *Sunray D-X Oil Company*, (judgment

entered January 17, 1973), and *Jobe et al.* v. *Amerada Petroleum Corporation et al.*, (judgment entered February 6, 1973). Review of each decision is sought pursuant to Supreme Court Rule 23-5 for the reason that each case contains identical or substantially similar questions of law.

OPINIONS BELOW

Reibert et al. v. *Atlantic Richfield et al.*

The Court of Appeals' opinion in *Reibert et al.* v. *Atlantic Richfield et al.*, (Appendix A), is not reported. No opinion was written by the District Court. The Findings and Recommendations of the Magistrate, filed on March 20, 1972 (Appendix B) is not reported. The order and judgment of the District Court, entered on March 30, 1972 (Appendix C) is not reported.

Mans et al. v. *Sunray D-X Oil Company et al.*

The Court of Appeals issued a *per curiam* opinion (Appendix D) which will not be published. The opinion was based upon *Reibert et al.* v. *Atlantic Richfield et al.*, (Appendix A). The order of the District Court (Appendix E) issued on May 20, 1971 was not published. Judgment was entered on June 7, 1971 (Appendix F).

Jobe et al. v. *Amerada et al.*

The Court of Appeals issued a *per curiam* opinion (Appendix G) on February 6, 1973 which will not be published and was based upon *Reibert et al.* v. *Atlantic Richfield et al.* (Appendix A). No opinion was written by the District Court. The Findings and Recommendations of the Magistrate, filed on January 11, 1972 (Appendix H) is not reported. The Order and Judgment of the Court (Appendix I) entered March 20, 1972 was not published.

JURISDICTION

The Court of Appeals entered judgment in *Reibert et al.* v. *Atlantic Richfield et al.*, on January 8, 1973; *Mans et al.* v. *Sunray D-X Oil Corporation et al.*, on January 17, 1972 and *Jobe et al.* v. *Amerada Petroleum Corporation et al.*, on February 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. ARE THE ANTI-TRUST LAWS AS IMPORTANT TO "MEMBERS OF ANY OTHER CLASS OF WORKERS" AS THEY ARE TO BASEBALL PLAYERS, FOOTBALL PLAYERS, LAWYERS AND DOCTORS? *Flood* v. *Kuhn*, 407 U.S. 258, 292 (1972).

2. CAN LARGE NATIONALLY INTEGRATED OIL COMPANIES MERGE THEIR FACILITIES IN VIOLATION OF THE ANTI-TRUST LAWS AND UNILATERALLY TERMINATE WITH IMPUNITY, THOUSANDS OF AMERICAN WORKERS WHO WERE DECLARED SURPLUS TO THE NEEDS OF THE ORGANIZATION AS A RESULT OF THE MERGER?

3. CAN CORPORATIONS WITH ECONOMIC POWER GAINED THROUGH ANTI-TRUST VIOLATIONS BE PERMITTED TO DO THAT WHICH THE GOVERNMENT ITSELF CANNOT DO—DESTROY THE RIGHT OF EMPLOYMENT OF THOUSANDS OF WORKERS?

4. CAN SOCIETY, UNDER THE INSTITUTIONALIZED "WORK ETHIC", IMPOSE UPON MAN A MORAL AND LEGAL OBLIGATION TO WORK UNDER A COM-

PETITIVE DIRECTIVE, AND THEN DENY HIM ACCESS TO THE COURTS TO PROTECT THE OPEN MARKET AND FREE COMPETITION WHICH MUST BE RELIED UPON TO PRODUCE JOBS?

5. IN A COMPREHENSIVE STUDY OF THE "CONCENTRATION OF ECONOMIC POWER" CONDUCTED BY THE TEMPORARY NATIONAL ECONOMIC COMMITTEE AND ADOPTED BY CONGRESS, IT WAS STATED: "IT IS THE FUNDAMENTAL DUTY OF EVERY SOCIETY WHICH IS DEVOTED TO THE PRINCIPLES OF OUR POPULAR GOVERNMENT TO LEAVE NOTHING UNDONE TO PRESERVE AND GUARANTEE THE OPPORTUNITY TO WORK TO EVERY CAPABLE AND WILLING MAN."

a. Does this mean that Congress, by enacting the federal antitrust laws, was accepting its correlative obligation under the work ethic which provides that a state, with the right to insist that every one work, has the corresponding duty to assure to all its citizens the right to work?

b. Does this mean that Congress was relying upon the forces of free competition to produce and to protect job opportunities?

6. IF, AS WAS HELD IN *UNITED STATES* v. *ALUMINUM COMPANY OF AMERICA*, 148 F.2d 416, 428-429 (2d Cir. 1945), THE PURPOSE OF THE ANTITRUST LAWS "WAS A DESIRE TO PUT AN END TO GREAT AGGREGATIONS OF CAPITAL BECAUSE OF THE HELPLESSNESS OF THE INDIVIDUAL BEFORE THEM", AND "TO PERPETUATE AND PRESERVE, FOR ITS OWN SAKE AND IN SPITE OF POSSIBLE COST, AN ORGANIZATION OF INDUSTRY IN SMALL UNITS," MUST THIS NOT MEAN THAT CONGRESS

WAS SEEKING TO PROTECT AND EXPAND JOB OPPORTUNITIES THROUGH THE FORCES OF FREE COMPETITION?

7. DO EMPLOYEES FALL WITHIN THE AREA OF THE ECONOMY OR ZONE OF INTEREST SOUGHT TO BE PROTECTED BY THE ANTITRUST LAWS?

8. DO SELLERS OF LABOR IN A FREE AND UNRESTRAINED MARKET HAVE RIGHTS EQUAL TO BUYERS OF LABOR?

9. IF FREE COMPETITION IS THE FORCE RELIED UPON BY CONGRESS TO PRODUCE AND PROTECT JOBS, DO EMPLOYEES, INJURED OR THREATENED WITH INJURY AS THE RESULT OF AN ILLEGAL CORPORATE MERGER, HAVE STANDING TO FILE AN ANTITRUST SUIT UNDER SECTION 4 AND SECTION 16 OF THE CLAYTON ACT?

STATUTES INVOLVED

The applicable statutory provisions involved are in pertinent part set forth in Appendix J. Included are the following:

1. Sherman Act, Section 1, 15 U.S.C. sec. 1
2. Clayton Act, Section 4, 15 U.S.C. sec. 15
3. Clayton Act, Section 7, 15 U.S.C. sec. 18
4. Clayton Act, Section 16, 15 U.S.C. sec. 26
5. Interstate Commerce Act,
   a. Sec. 5, 49 U.S.C. sec. 5 (2) (a)
   b. Sec. 5 (2) (c), 49 U.S.C. sec. 5 (2) (c)
   c. Sec. 5 (2) (f), 49 U.S.C. sec. 5 (2) (f)
   d. Sec. 5 (b) (9), 49 U.S.C. sec. 5 (b) (9)
6. 10 Okla. Statutes 1971 sec. 12
7. 32 Okla. Statutes 1971 sec. 3

STATEMENT OF THE CASES

Introduction

The petitioners are asking this Court to review three separate corporate mergers which form a significant part in a general merger trend within the petroleum industry. These three mergers involved six previously independent oil companies with combined assets of nearly seven billion dollars. Considered with the numerous other corporate mergers involving oil companies, the petroleum industry has become highly concentrated. Fifteen of the largest oil companies, in 1968, controlled 75% of the total United States refinery capacity, and produced 61.8% of the domestic crude oil.

As a result of the merger trend and the increased economic concentration, thousands of petroleum related jobs have been eliminated. In the three cases involved in this petition, employees *terminated as a direct result of these mergers* filed private antitrust actions challenging the legality of the mergers.

THE ATLANTIC RICHFIELD-SINCLAIR MERGER

1. Facts of Case

This private antitrust suit was filed as a class action on September 15, 1969 in the United States District Court for the Northern District of Oklahoma to challenge, under the antitrust laws, the legality of the corporate merger of Atlantic Richfield Company and the Sinclair Oil Corporation. Reibert, a highly skilled research technician in the petroleum industry, had been employed by Sinclair for more than 17 years until Sinclair was merged into Atlantic Richfield.

Atlantic Richfield and Sinclair, two highly integrated oil companies operating in a national market, entered into a merger agreement on October 31, 1968. The merger was finally consummated on March 4, 1969. Immediately thereafter, there was a consolidation of facilities of Atlantic and Sinclair which resulted in the termination of employees. The named petitioner, Delbert C. Reibert, a salaried research technician, was terminated on June 13, 1969 when, as part of the merger and consolidation plans, the Sinclair research facilities located in Tulsa, Oklahoma were closed.

Just a few years before this merger, Sinclair had held 50% of the stock of the Richfield Oil Corporation. After Atlantic Refining acquired Richfield, Sinclair owned and held 2,447,162 shares of Atlantic Richfield; however, Sinclair was forced to sell these shares as a result of an antitrust agreement with the Justice Department. Thereafter, Atlantic Richfield turned around and acquired all of the stock of Sinclair. The Atlantic-Sinclair merger created a company with assets in excess of four billion dollars, controlling 7.6% of the national refinery capacity and 43% of the total refinery capacity in the State of Pennsylvania.

As part of the merger and consolidation plans, Atlantic Richfield unilaterally adopted a policy governing terminations resulting from the merger. It was explicitly stated by Atlantic Richfield that:

> "The purpose of this policy is to provide special allowances to certain employees **who will be terminated as a direct result of the merger** of Sinclair Oil Corporation into Atlantic Richfield Company." (Emphasis ours.)

Within the first year following the merger, 4,000 employees were, in the words of Atlantic, "declared surplus to

the needs of the organization as a result of the merger", and were terminated by Atlantic. Of this total number of terminations during the first year, there were 549 persons who had worked for Sinclair for a period longer than fifteen (15) years; and there were 561 persons who had worked for Atlantic for a period longer than fifteen (15) years. With its termination policy adopted as part of the merger plans, the average age of employees retained by Atlantic Richfield was nearly three years lower than it was for the respective companies prior to the merger—from an average of forty-five (45) years of age to an average of 42.13 years of age.

The employees, terminated by Atlantic Richfield as a direct result of the merger, lost their accumulated retirement credits. Persons over a certain age and possessing skills suitable only for the petroleum industry faced reemployment difficulty or they were unemployable. The named petitioner, Delbert C. Reibert, was nearly forty (40) years of age at the time of his termination. He had been with Sinclair for seventeen (17) years, during which time he had become highly skilled. His skill pertained to the petroleum industry and was not easily transferable. Following his termination, Reibert diligently sought, but was unable to find a position that could utilize his highly technical experience gained at the Sinclair Research Lab. In October, 1970, Reibert finally took a job as a draftsman, a position that he had held when he was first employed by Sinclair some eighteen (18) years earlier.

2. The Trial Court

After being terminated as a direct result of the Atlantic-Sinclair merger, the petitioner, Reibert, filed this suit as a class action on September 15, 1969. Petitioner sought treble damages under Section 4 of the Clayton Act (15 U.S.C. sec. 15), and injunctive relief under

Section 16 of the Clayton Act (15 U.S.C. sec. 26) for himself and on behalf of all other Atlantic-Sinclair employees similarly situated. On December 1, 1969, Petitioner filed a motion for partial summary judgment seeking to dispose of certain legal issues including standing of employees to sue under the antitrust laws. This motion was denied on February 24, 1970. From that date until March 20, 1972 when this case was dismissed on the motion for summary judgment filed by Atlantic Richfield, the petitioner engaged in extensive discovery, principally on the question of the legality of the merger. The trial judge adopted the Finding and Recommendations of the Magistrate without comment and dismissed the suit on the ground that employees lack standing under the antitrust laws.

3. The Appeal

On January 8, 1973, the Court of Appeals for the Tenth Circuit affirmed. It concluded that employment was not "business or property" as these terms are used in Section 4 of the Clayton Act (15 U.S.C. sec. 15). It further held that any injury suffered by the employees *was indirect or remote,* although the Court did agree that the employees *were terminated as a result of the merger.*

THE SUNRAY DX-SUN OIL MERGER

1. The Facts

This class action was filed on April 30, 1970 in the United States District Court for the Northern District of Oklahoma by the Petitioner, Ken F. Mans, for himself and on behalf of other employees similarly situated. It challenges the legality of the merger of Sunray DX Oil Company and Sun Oil Company under the antitrust laws and

seeks treble damages and injunctive relief as provided for under Sections 4 and 16 of the Clayton Act (15 U.S.C. secs. 15, 16).

Sunray DX Oil Company and Sun Oil Company, two similarly structured corporations, prior to their merger were highly integrated oil companies. The merger, effective on October 25, 1968, eliminated all competition previously existing between the companies, and created a corporation with assets in excess of two billion dollars. As a result of the merger, Sun Oil increased its rankings among Fortune's 500 largest industrials to 42 in terms of sales and 28 in terms of assets.

As a direct result of the Sunray DX-Sun Oil merger, the petitioner, Ken Mans, was terminated. He had been with Sunray DX since 1954, and through a number of promotions, he was, at the time of the merger, the manager of compounder-blender sales and was earning $1,360 per month. The first public announcement of how this merger would affect employees came out in November, 1969. Sun Oil announced that 900 jobs in Tulsa would be eliminated (Tulsa World, November 4, 1969 at p. 1). The petitioner, by affidavit, stated to the trial court that he was aware of Sun Oil's plan to reduce its work force by some 3,000 to 4,000 employees.

Sun Oil offered the petitioner a chance to transfer from Tulsa to the Dallas, Texas office. The transfer offered, however, was for a lower job classification with lower wage scale and with lesser responsibility. Instead of accepting this lesser job, the petitioner elected to challenge the merger under the antitrust laws. This decision was made in spite of the fact that it caused the petitioner to be denied the severance pay given to other employees terminated by reason of the merger.

2. The Trial Court

The complaint in *Mans* was filed on April 30, 1970. On May 20, 1971, the trial court entered judgment (Appendix E) on the ground that employees do not have standing under the antitrust laws. The court concluded that the plaintiff was *only a salaried employee* and *not a commission sales agent* with a competitive territory upon which his earnings depended.

3. The Appeal

On January 17, 1973, the Court of Appeals for the Tenth Circuit affirmed and filed a *per curiam* opinion. The Court held that under *Reibert et al.* v. *Atlantic Richfield et al.*, a salaried employee, as opposed to an employee paid on a commission basis, lacked standing to sue under Sections 4 and 16 of the Clayton Act.

THE AMERADA-HESS MERGER

1. Facts of Case

This class action was filed on February 24, 1970 in the United States District Court for the Northern District of Oklahoma by the petitioner, Del Jeannene Jobe, for herself and on behalf of all other employees similarly situated. It challenges the legality of the merger of Amerada Petroleum Corporation and Hess Oil and Chemical Corporation under the antitrust laws and seeks treble damages and injunctive relief as provided for under Sections 4 and 16 of the Clayton Act (15 U.S.C. secs. 15 and 26).

Hess Oil and Chemical Corporation ("Hess") was merged into Amerada Petroleum Corporation ("Amerada") on June 20, 1969. Prior to the merger, Hess was an

integrated oil company engaged in some exploration and production but principally involved in refining and marketing. During 1968, it had sales of about $460,000,000, and as of December 31, 1968, its assets amounted to about $491,000,000. Amerada had been principally engaged in domestic and foreign exploration and production. During 1968, its sales totaled about $256,000,000, and as of December 31, 1968, its assets amounted to $354,000,000.

Prior to the merger, Amerada had no import quota; therefore, to satisfy a domestic market, it was active in domestic exploration and production. Following the merger, the large import quota of Hess allowed the company to curtail domestic production. This is reflected in the fact that many of the employees terminated had previously worked in the area of production. In one reorganizational study, it was shown that the geophysical crews could be reduced from 160 to 35.

As a direct result of the Amerada-Hess merger, the petitioner, Del Jeannene Jobe, was terminated. She was a draftsman in the geophysical department of Amerada and was terminated on February 2, 1970. After the petitioner filed this action, two other employees, terminated on February 2, 1970, joined the suit as plaintiffs. Robert R. McDole was first employed by Amerada in September, 1950 and worked as a geophysical draftsman. Roy E. Michael, the second person to join this suit, was also a draftsman in the geophysical department of Amerada.

2. The Trial Court

The complaint filed in this case was filed on February 24, 1970. After extensive discovery by the plaintiff, the defendants, on December 22, 1971, filed a motion for summary judgment on the ground that claimed loss of employment does not constitute injury to business or prop-

erty. On January 11, 1972, the Magistrate issued a recommended order sustaining this motion (Appendix H). This recommended order was approved without comment by Judge Barrow on March 20, 1972 (Appendix I).

3. The Appeal

On February 6, 1973, the Court of Appeals for the Tenth Circuit affirmed and filed a *per curiam* opinion (Appendix G). Following *Reibert et al.* v. *Atlantic Richfield et al.*, a salaried employee, as opposed to an employee paid on a commission basis, lacked standing to sue under Sections 4 and 16 of the Clayton Act.

REASONS FOR GRANTING THE WRIT

I. The decision below is inconsistent and contrary to established precedent.

Decisions from this Court and other Courts clearly support the standing of employees under the antitrust laws. The lower Court in the case refused to follow this precedent, or distinguished cases on totally spurious grounds. Any person injured in his business or property by reason of anything forbidden by the antitrust laws has standing under Section 4 of the Clayton Act to sue for treble damages.

In *Hawaii* v. *Standard Oil Company of California*, 405 U.S. 251, 264 (1972), this Court approved and adopted the definition of the terms "business or property" as stated in *Roseland* v. *Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942) which was that "business or property" included:

> " 'employment or occupation in which a person is engaged to procure a living.' " (*Id.* 419).

The word "business" as used in Section 4 of the Clayton Act was held in *Roseland* to signify "that which habitually busies; or engages time, attention or labor, as a principal serious concern or interest." *Roseland, supra* at 419.

A man's job clearly fits the definition of "business" that this Court approved in *Hawaii*. He works at his job as a principal serious concern and interest to support himself and his family as he is morally and legally obligated to do. This Court also recognized that salaried employees had standing under the antitrust laws in *Perkins* v. *Standard Oil Company*, 395 U.S. 642 (1969), a decision relied upon by the Court in *Bay Guardian Co.* v. *The Chronicle Publishing Co.*, 340 F.Supp. 76 (N.D. Calif. 1972).

Likewise this Court upheld the standing of employees in *Radovich* v. *National Football League*, 352 U.S. 445 (1957) and *Flood* v. *Kuhn*, 407 U.S. 258 (1972). Yet the lower court in the present case refused to follow these cases and denied standing to the petitioner-employees. The Tenth Circuit also refused to follow *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332 (7th Cir. 1967) and *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967). In substance, the lower Court reasoned that these cases did not apply to a mere salaried employee.

In *Roseland* and *Dailey*, the employees involved were salesmen who, according to the Tenth Circuit "were quasi-businessmen operating in a market carved out by their own aggressiveness and salesmanship qualities." (Appendix A, p. A8). On the other hand the petitioner was described as a mere salaried employee who did not operate out of any specific market. Based on this spurious distinction, an aggressive salesman would have standing under the antitrust laws; however, access to the Courts and all antitrust relief would be denied to research technicians, map draftsmen, and other *mere salaried employees*. The reason given by the lower Court for refusing to follow *Radovich* and *Nichols* is equally fallacious.

If the strained distinctions of the Tenth Circuit are allowed to stand, thousands of workers who have faithfully served their corporate employers for many years, will be denied access to the Courts and the lawful protection of the antitrust laws for all employees. The Tenth Circuit has created "an anomaly and an aberration" that will surpass the distinction between baseball and football. *Flood* v. *Kuhn*, 407 U.S. 258 (1972). When access to the Courts depends upon the job description given a man or upon the method by which he is paid, we will have removed the blindfold from the symbol of justice. Thereafter, value judgments, rather than law will control judicial decisions.

When Congress allowed "any person injured in his business or property" by an antitrust violation to sue for treble damages, was it extending protection to commission salesmen and football players and excluding all other employees? Regardless of the job description, the method for computing compensation, or the amount of compensation, the fact is that an employee is an employee. Whether a salesman, geologist, secretary, research technician, football player or other, they are all people living in one society; faced with similar responsibilities; and sharing in the same aspirations. Their job is their "business" and is the vehicle through which they satisfy their obligations to society and to their families.

Reviewing all of the judicial precedent on the question involved in this case, the Court, in *Vandervelds* v. *Put & Call Brokers & Dealers Ass'n*, 344 F.Supp. 118, 153 (S.D.N.Y. 1972), observed: "Until the last decade, Courts denied standing to employees seeking to recover salary lost when their employers' business was injured by an antitrust violation." However, as the Court continued: "More recent decisions have accorded an employee standing."

We have come to recognize more fully the critical importance of the antitrust laws to all American citizens and to all employees. The unfortunate distinction of the Tenth Circuit which classifies employees cannot be allowed to stand. As Mr. Justice Marshall declared in his opinion filed in *Flood* v. *Kuhn*, 407 U.S. 258, 292 (1972):

> "The importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players as to football players, lawyers, doctors, or *members of any other class of workers.*" (Emphasis added).

II. The lower Court erroneously applies and expands the "directness rule".

One must show that his "business or property" was injured "by reason of anything forbidden in the antitrust laws" to support a claim under Section 4 of the Clayton Act (15 U.S.C. sec. 15). The lower court ruled that the employees did not satisfy this causation language because they could not show that the injury resulted from a *lessening of competition.* With this serious misreading of the language of Section 4, the lower court created a loophole through which most antitrust violators can escape.

Causation, under Section 4, is measured through the words "by reason of anything forbidden in the antitrust laws." A reading of the antitrust statutes shows that *the forbidden act* involved in this case *is the merger* and *not the lessening of competition.* A restraint of trade, standing alone, would not be a violation of Section 1 of the Sherman Act (15 U.S.C. sec. 1). The forbidden act under this section of the antitrust laws is any *Contract* that restrains trade. Likewise, a lessening of competition is not illegal under Section 7 of the Clayton Act (15 U.S.C. sec. 18). The forbidden act under this antitrust provision is the *merger.*

The lower court concedes that the employees were terminated as a direct result of the merger alleged to be illegal and forbidden under the antitrust laws. A clear inconsistency stated by the Tenth Circuit is as follows:

> "At best, appellant's discharge was no more than an outgrowth of the alleged *unlawful merger.* He has failed to show the necessary directness of injury caused by the *illicit acts.*" (Appendix A, p. A12) (Emphasis added).

The inconsistency is illustrated by the emphasized words of the lower court—admitting that the employees were terminated by reason of an *unlawful merger*, but then holding that injury was not a direct result of the *illicit acts*. Under the antitrust laws, the unlawful merger is the illicit or forbidden act. With all due respect for the lower court, its explanation of the statutory requirements of Section 4 is difficult to accept. There appears to be a basic misunderstanding that, at least in this case, reaches great proportions. The lower court states:

> "Terminations of employment will often occur whether a merger is legal or illegal. It is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency." (Appendix A, p. A11).

We are not concerned with a legal merger in this case; to resolve the issue of standing the illegality of the merger is presumed. It is obvious that if the merger were not illegal, the employees would recover nothing. This surely cannot mean, however, that because an employee may be terminated following a legal merger, he is without standing to sue if the merger is illegal. The admitted right of an employer to terminate employees is based on the assumption that the decision to terminate is reached independent of an antitrust violation. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *United States* v. *Parke Davis and Company*, 362 U.S. 29 (1960); *Simpson* v. *Union Oil Company of California*, 337 U.S. 13 (1964).

The error of the lower court is in its conclusion that the alleged injury is indirect and remote unless it attaches to the "lessening of competition". In support of this conclusion, the lower court notes from *Brown Shoe Co.* v.

United States, 370 U.S. 294, 320 (1962) that Section 7 of the Clayton Act was intended to protect *competition*. It was reasoned from this that the injured employees, to have standing, must show that they were engaged in *competition* within the petroleum industry. It stated that a *competitor* of the acquiring or acquired corporation might have standing to bring this action (Appendix A, pp. A10-A11).

Brown Shoe was not accurately interpreted by the Tenth Circuit. What this Court actually said in *Brown Shoe* and again in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963) was that the purpose of Section 7 of the Clayton Act was to protect competition, *not competitors*. This means that the enforcement of the antitrust laws cannot be left to competitors as the Tenth Circuit would do. Testimony of competitors that the merger involved in *Philadelphia National Bank* was procompetitive was considered by this Court as having very little probative value since the purpose of the statute was to protect "'*competition*, not *competitors*.'" *United States* v. *Philadelphia National Bank*, *supra* at 367 (emphasis belongs to Court).

As used by this Court, the word "competition" has been in reference to "our fundamental national economic policy". *Philadelphia National Bank*, *supra* at 372. Competition is the economic regulator of all matters *including employment*. The Tenth Circuit uses the word "competition" to exclude from the protection of the antitrust laws all but competitors. When this Court gives little probative value to testimony of competitors, it is difficult to see how private enforcement under Section 4 can be limited to competitors. These are unreliable private attorney generals since the competitors are responding by entering into

merger themselves. For example, this Court now has six competing companies to which the Tenth Circuit would leave private antitrust enforcement—Sinclair was merged into Atlantic Richfield; Sunray DX was merged into Sun Oil; and Hess Oil merged with Amerada Petroleum Corporation.

Reliance by the Tenth Circuit on *Billy Baxter Inc.* v. *Coca-Cola Company*, 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971), and *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), cert. denied 406 U.S. 930 (1972) is misplaced. These cases involved the standing of a franchisor and a landlord. Nevertheless, the petitioner submits that the directness requirements of *Billy Baxter* and *Calderone* are satisfied in this case.

Even if the lower court was considered correct about measuring causal connection to the "lessening of competition", the petitioner satisfies the directness requirement. Corporations can compete only through the actions of people—the employees. Consequently the "lessening of competition" resulting from a corporation merger can be measured by the resulting reduction in the number of employees. This can be seen even from the observations of the lower court. When it stated that the termination of employees is a natural effect of a merger of two similarly structured businesses, it was actually defining the "lessening of competition."

Employees are the most reliable persons to challenge illegal mergers because employees are more directly affected by corporate mergers. Consider: *Office of Communication of the United Church of Christ* v. *F.C.C.*, 359 F.2d 994, 1000-1004 (D.C. Cir. 1966).

III. The lower Court ignored the clearly expressed congressional policy supporting the standing of employees.

Although thoroughly briefed, *the lower court gave no attention to the Congressional expressions and policy* that allows employees injured by an illegal merger to seek treble damages and injunctive relief. From the very inception of federal antitrust laws, Congress recognized the causal connection between economic concentration and employees. As noted in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945): Congress in 1890 sought to put an end to great aggregations of capital "because of the helplessness of the individual before them". 21 Cong. Rec. 2457 (1890) (remarks of Senator Sherman).

Senator George, speaking of the treble damage provision in the Sherman Act, stated that this section gave standing to the "farmer, mechanic, *laborer* and consumer". 21 Cong. Rec. 3150 (1890). When the Clayton Act was passed in 1914, there was strong Congressional support for private antitrust suits. Senator Borah stated that: "There could be no safer guardian for the Sherman Anti-trust law than the hundreds and thousands of people who are injured by these monopolies." 51 Cong. Rec. 15986 (1914) "Because you are threatening to take money out of his pockets, the offender will begin to open his eyes and show greater obedience for the law." 51 Cong. Rec. 16275 (1914) (remarks of Congressman Webb).

Persons recognized as the ones suffering the most from the great combinations of wealth were identified as "the consuming public", "the struggling poor of our country", *"the employee who loses his job"*, and the "citizens and their children" who desire the right to enter business. 51 Cong. Rec. 16043 (1914) (remarks of Senator Norris); 51 Cong. Rec. 9088 (1914) (remarks of Congress-

man Mitchell). In the final report of the Temporary National Economic Committee of the extensive study of economic concentration, it was stated that the degree of economic concentration was so great that,

> "the opportunity of those individuals who will constitute the next generation will be completely foreclosed unless"

the trends are reversed. Temporary National Economic Committee, Investigation of Concentration of Economic Power, S. Doc. 35, 77th Cong., 1st Sess., 9 (1940) (Referred to hereafter in this petition as TNEC Report.)

The merger trend has already created an economic barrier for any individual to freely enter into many businesses. Within the petroleum industry one can enter business as a service station operator; however, as a producer, refiner and large scale marketer of petroleum products, the market is preempted by industrial giants. About the only thing that an individual can realistically expect is advancement and retirement as an employee. The lower court is allowing large corporations to destroy even this employment opportunity.

Congress provided protection to employees through the antitrust laws. As stated in the TNEC Report: "It is the fundamental duty of every society which is devoted to the principles of popular government to leave nothing undone to preserve and guarantee the opportunity to work to every capable and willing man." TNEC Report at 6. And as President Roosevelt said on the subject of economic concentration and employment:

> "No people, least of all a democratic people, will be content to go without work or to accept some standard of living which obviously and woefully falls short of their capacity to produce. No people, least of all

a people with our traditions of personal liberty, will endure the slow erosion of opportunity for the common man, the oppressive sense of helplessness under the domination of a few, which are overshadowing our whole economic life." TNEC Report at 15.

IV. The present case raises important and unsettled questions relating to the reach of the antitrust laws.

When under the Interstate Commerce Act, certain common carrier mergers approved by the I.C.C. were exempt from the antitrust laws (49 U.S.C. sec. 5 (b) (9)), it was recognized by Congress that the employees would be injured. (Hearings before the Committee on Interstate Commerce, United States Senate on S. 1310 and S. 2016, 76th Cong., 1st Sess. 387 (remarks of Tom M'Grath, 1939); H. Rept. 1217, Transportation Act of 1939, 76th Cong., 1st Sess. 12 (1939).) It was noted in the debates that 80% of the savings affected by consolidation was taken out of the pockets of railroad workers. 84 Cong. Rec. 9883 (1939).

The House passed the Harrington Amendment to protect these employees:

> "Provided, however, that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9881 (1939);

n conference, the Harrington Amendment was substituted y the present wording of the employee statutory protecon. H. Rept. No. 2832, Conference Report on Transportaon Act of 1940, 76th Cong. 3rd Sess. 68-69 (1940).

Section 5(2) (f) of the Interstate Commerce Act imses upon the Commission a positive duty to protect the

interest of the railroad employees affected. *Norfolk and Western Railway Company* v. *Nemitz*, 92 S.Ct. 185 (1971). The statute provides that:

> "In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment. . . ." (49 U.S.C. sec. 5 (2) (f)).

Following this statutory mandate, the Commission withheld approval of the agreement between Great Northern and Northern Pacific until the 5,200 employees scheduled to be terminated had received "guarantees and job assurances for the rest of their working lives." Motion to affirm filed by I.C.C. at p. 7, *United States* v. *I.C.C.*, 396 U.S. 491 (1970).

The question that this Court must decide is: *Would Congress provide explicit protection to employees affected by a legal merger, and deny protection to all other American workers who are displaced or affected by an illegal merger*? It would appear reasonable to assume that Congress expected employees to be protected by the forces of free competition. The special protection for railroad employees was necessary because Congress reduced competition where railroads were concerned. Previously, the employees of the Great Northern and Northern Pacific had received protection through the preservation of free competition. *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904).

A related question that this Court must decide is whether employees are entitled to an open and unrestrained market. At common law, even an employee

terminable at will had a right to an "open market". *Huskie* v. *Griffin*, 75 N.H. 345, 74 Atl. 595, 596 (1909). ". . . one who interferes with this free market must justify his acts or respond in damages." *Id.* at 597. The Court in *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332, 335-336 (7th Cir. 1967) indicated that much the same was true under the antitrust laws. It stated that:

> ". . . agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also . . . impair full and free competition in the supply of a service or commodity to the public." *Id.* at 335-336.

An open and unrestrained market is imperative to employees who must, according to the principles of the "work ethic", accept and follow the competitive directive. S. DeGrazia, The Political Community, A Study of Anomie, 51 (1948). The obligation to work is deep rooted in the make-up of men. Evolving from the religious teachings of Luther and Calvin, who preached that work was a form of serving God, a moral obligation to work was emplanted in man. A. Tilgher, Homo Faber, Work Through The Ages, 49, 58 (Trans. I. Fisher 1958). Idleness was "shunned as a deadly sin." *Id.* at 59.

With the Renaissance and the industrial revolution, work took on a new character: "the idea of work for its own sake". Tilgher, *supra* at 71. In a capitalistic society, it was only by work that man found his nobility and worth. "His whole code of ethics is contained in one precept, 'work'!" *Id.* at 134. An American without a job is a misfit. "To hold a job means to have status, to belong in the way of life." *Id.* at 46. In fact, as one writer notes: "Work itself keeps a man 'normal'." E. Bakke, Citizens Without Work, 248 (1940).

Man not only has a deep moral obligation to work, there are legal obligations that require him to work. Adriano Tilgher, recording the history of labor, observed that work is its own reward, and that because man ought to live by his own works, "*the state has a right to insist that everyone do work as much as he can.*" A. Tilgher, *supra* at 93-94 (Emphasis added). The laws of the State of Oklahoma offer an example of what Tilgher was saying. In Section 3 of Title 32, Oklahoma Statutes, 1971, it is provided:

> "The husband must support himself and his wife out of the community property or out of his separate property *or by his labor.*" (Emphasis added).

And at Title 10 Oklahoma Statutes 1971, sec. 12, it is provided:

> "It is the duty of the father and the mother of any poor person *who is unable to maintain himself by work*, to maintain such person to the extent of their ability." (Emphasis added).

Society does not assume the primary responsibility for the economic support of its people. To insure this support, the state exercises its right to insist that people work. From childhood, we have been taught that "the poor are poor because by being idle or unemployed they violate the competitive directive." S. DeGrazia, *supra* at 51. We are slow to feed the poor because of the deep belief that everyone ought to live by his own works. But how can man be obligated to work and support his family if corporations are allowed to violate the antitrust laws and in the process destroy thousands of jobs?

Congressman Kelley, in the Clayton Act debates, declared that big business through its "art of trickery and debauchery" has brazenly defied the spirit of the laws

made to protect the public. 51 Cong. Rec. 9087 (1914). He saw no room for compromise, and called for a halt to the "evils which have brought concentration of wealth and diffusion of poverty." 51 Cong. Rec. 9087 (1914). People stay out of poverty by working; however, jobs, in the United States, are produced only through free competition.

Adriano Tilgher, who recognized that, under the work ethic, the state has a right to insist that everyone work, also observed that:

> *"The state has the corresponding duty to assure to all its citizens the right to work."* A. Tilgher, *supra* at 94 (Emphasis added).

This obligation is satisfied by the state by keeping unrestrained the forces of free competition. Congress called for a halt to corporate mergers and the resulting increases in economic concentration in an effort to preserve an open market for employees. As stated in the TNEC Report at 6:

> "It is the fundamental duty of every society . . . to leave nothing undone to preserve and guarantee the opportunity to work to every capable and willing man."

By denying access to the courts to employees in this present case, the lower court has created a jurisprudential aberration. Man is still required, morally and legally, to work; however, he is denied the right to protect his job against the attack of corporations that defy the antitrust laws. This Court must decide if the antitrust laws offer any protection to employees.

V. Issues in this case are important to a substantial segment of American Society.

Rejecting the *parens patriae* suit in *Hawaii* v. *Standard Oil Company of California*, 405 U.S. 251, 265 (1972), this Court stated that: "Private citizens are not as powerless . . . as the State suggests." Private citizens, in order to enhance the efficacy of private actions, were advised to "combine their limited resources to achieve a more powerful litigation posture." *Hawaii, supra* at 266. The petitioners in these cases followed this course which is the only effective way to challenge multi-billion dollar aggregations of capital.

The issues in this case do not involve only a single employee; all the employees included in the class are affected. All working and unemployed Americans will be equally affected by the decision in this case. Because competition is the economic regulator, jobs and job opportunities are produced and preserved through the forces of free competition. Corporate mergers are now the most serious threat to these competitive forces. Today, unemployment and poverty pervades this Country principally because of the erosion of competition through the continuing merger trend.

There will be many more corporate mergers in the future; and consequently many more employees terminated. More people will be cast into poverty and those born in poverty or to be born in poverty will find it harder to escape. Only through jobs and work can a person escape the pain of poverty and the indignity of welfare. When left unrestrained by illegal corporate mergers, competition will produce jobs.

Corporate mergers will continue in the future because it costs a corporation nothing to violate Section 7 of the

Clayton Act. Since the Clayton Act carries no criminal sanction, corporations are willing to take their chances with the Government. Even if their merger is challenged by the Government, the corporation can reap enormous windfall profits principally at the expense of the employees. The lower court in this case has now created a legal sanction for this practice. It stated that the termination of employment "is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency." (Appendix A, p. A11).

This Court has done much in defining the personal rights and liberties of the people of America. What good is this cherished liberty, guarded so vigilantly by this Court, when giant corporations are permitted, for the sake of higher profits, to destroy jobs and therefore our economic freedom?

What good are personal rights and liberties when the citizens of this Country are committed to economic slavery "from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the Country, including the production and sale of the necessaries of life." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 83 (1911) (concurring and dissenting opinion of Mr. Justice Harlan).

Employees could organize into large nationwide unions for some protection against the great concentration of economic power in the hands of a few corporations. Congress, however, in passing the Celler-Kefauver Act, expressed opposition to this alternative. H.R. Rep. 1191, 81st Cong., 1st Sess. 13 (1949). It opposed both kinds of concentrated power in the hands of private persons, because such would necessarily lead "to big bureaus in the Government to deal with them." H.R. Rep. 1191, 81st

Cong., 1st Sess. 13 (1949). The Congressional purpose was for jobs to be produced and employees protected by the forces of free competition.

Corporations with their enormous economic power have, however, been allowed to destroy the forces of free competition and escape the penalty of the law. Denying access to the courts to employees for the purpose of defending the competition upon which they still must rely for jobs, corporations have completed their evolution. Large national corporations have long become more powerful than states. "[L]ocal communities and States are no longer economically self sufficient, but are dependent for their commercial and industrial life upon the acts and decisions of persons and organizations beyond their jurisdiction." TNEC Report, *supra* at 5. See also, *Northern Securities Co.* v. *United States,* 193 U.S. 197, 327-328 (1904).

Corporations, with the lower court's opinion, have now gained an advantage over the National government. With access to the courts closed to employees, corporations are free to violate the antitrust laws and engage in wholesale termination of employees, eliminating thereby much of the accumulated retirement benefits. Government and government agencies do not enjoy the same freedom to arbitrarily destroy the rights of people. *Flast* v. *Cohen,* 392 U.S. 83 (1968); *Association of Data Processing Service Organization, Inc.* v. *Camp.,* 397 U.S. 150 (1970); *Barlow* v. *Collins,* 397 U.S. 159 (1970); *Sierra Club* v. *Morton,* 405 U.S. 727 (1972).

Congress has taken the position that corporations are not to be allowed to do that which government cannot do. "If the political structure is designed to preserve the freedom of the individual, the economic structure must not be permitted to destroy it." TNEC Report, *supra* at 5.

Economic organizations are "called into existence by men to meet their material needs"; they are therefore "justified only to the degree in which they serve the entire community." *Id.* "Like government organization, business organization has no right or function to control the activities and the lives of men." *Id.*

The evolution of corporations was completed with the opinion of the Tenth Circuit issued in this case. With this decision, corporations are permitted to dominate the lives of people. Unless the lower court opinion is set aside, the people of this Country must submit their lives to the will of the economic corporate giants.

When a poor man steals a loaf of bread because he is hungry, he is vigorously prosecuted and sent to jail. Corporations that show contempt for the law must be prosecuted with equal vigor if we are to endure as a legal society. Based on the lower court's opinion, corporations can ignore with impunity the very laws designed to protect employees. These employees and other little people, not needed by these merging corporations, have been left to be trampled under at the will of a few select and economically powerful men.

Congress observed that the monopolist that takes away a man's job takes away his life. TNEC Report, *supra* at 6. When courts sanction this travesty by closing their doors to employees, the personal suffering becomes intolerable. As the poor man is prosecuted for violating the law, corporations that violate the antitrust laws must be prosecuted. Where illegal corporate mergers are involved the only effective prosecution is the private antitrust suit.

The criminal sanction was deleted from the Clayton Act by Congress in an effort to avoid the strict construction rule attached to penal statutes. There was some ob-

jection to this deletion; however, the private treble damage relief provided was considered to be more effective than the criminal prosecution. 51 Cong. Rec. 16319 (1914) (remarks of Congressman Floyd).

The lower court has made a tragic mistake that can now be corrected only by this Court.

CONCLUSION

For all the above reasons, this writ should be granted and the judgments of the Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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